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No. 84-699

Office-Supreme Court, U.S.
FILED

JAN 8 1985

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

**NATIONAL MOTOR FREIGHT TRAFFIC
ASSOCIATION, INC. AND NATIONAL CLASSIFICATION
COMMITTEE, PETITIONERS**

v.

**UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission may order a tariff cancelled where it was formulated under procedures, specified in an unapproved ratemaking agreement, that violate the Motor Carrier Act of 1980.



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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) and the decision of the Interstate Commerce Commission (Pet. App. 7a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on June 8, 1984. A petition for rehearing was denied on August 2, 1984 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on October 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Motor carriers subject to regulation by the Interstate Commerce Commission (ICC or Commission) are authorized by Congress to enter into rate agreements with other carriers. See Reed-Bulwinkle Act of 1948, as amended, 49 U.S.C. 10706(b). The carriers have established rate bureaus to facilitate the negotiation of collective rates and to act as their agents in submitting tariffs to the Commission. Carriers participating in a rate bureau enjoy antitrust immunity for their collective ratemaking activities so long as the bureau's agreement describing the manner in which it will negotiate collective tariffs has been approved by the Commission and the carriers' actions conform to that agreement. See *ICC v. American Trucking Ass'ns, Inc. (ATA)*, No. 82-1643 (June 5, 1984), slip op. 1-2.

In Section 14 of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 803 (MCA), Congress set forth specific requirements that rate bureau agreements must satisfy if they are to be approved by the Commission (49 U.S.C. 10706(b)(3)). These requirements reflect Congress's intent "to lift the veil of secrecy that ha[d] obscured ratemaking for over 30 years" (Pet. App. 14a). Congress was concerned that the rate bureau process was "controlled largely by rate bureau employees rather than the carriers." H.R. Rep. 96-1069, 96th Cong., 2d Sess. 27 (1980) (House Report). Although it did not eliminate rate bureaus, Congress made it clear that "rate bureau employees should play less of a part in determining carrier rates than the carriers themselves." S. Rep. 96-641, 96th Cong., 2d Sess. 14 (1980) (Senate Report); see also House Report 27. Accordingly, the MCA prohibits a rate bureau from permitting "one of its employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item" (49 U.S.C. 10706(b)(3)(B)(iv)). Meetings at which rates are discussed must be open and rate bureaus must, upon request,

divulge the name of the proponent of a rate and the vote cast by any member carrier (49 U.S.C. 10706(b)(3)(B)(v)).

Section 14(e) of the MCA (94 Stat. 808) provided that a rate bureau could continue to function under previously granted immunity, provided that it submitted a new or amended agreement to the Commission for approval and complied with the requirements of the MCA and any implementing regulations while the agreement was being considered by the Commission (see Pet. App. 10a). The Commission issued an interpretive ruling in December 1980 explaining how it "planned to implement the new statutory guidelines for rate-bureau immunity" and "establish[ing] procedures whereby rate bureaus could submit existing agreements to the Commission for approval under the new standards" (*ATA*, slip op. 2, 3). See *Motor Carrier Rate Bureaus — Implementation of P.L. 96-296*, 364 I.C.C. 464 (1980). In this ruling, the Commission interpreted 49 U.S.C. 10706(b)(3)(B)(iv) and (v) to prohibit rate bureau employees from initiating or submitting rate proposals and from making final determinations to adopt, reject or otherwise dispose of such proposals (364 I.C.C. at 478-481). Rather, the Commission concluded, employee advice "shall be available only as a resource to the party(ies) which actually initiates the tariff proposals" (*id.* at 480).¹

2. Petitioner National Motor Freight Traffic Association (NMFTA) is a rate bureau. It publishes the National Motor Freight Classification, a tariff containing the

¹Shipper and motor carrier interests sought judicial review of various portions of the Commission's order, but not of its interpretation of the statutory provisions at issue here. In *ICC v. ATA, Inc.*, *supra*, the Court upheld that part of the order announcing the Commission's intention to remedy serious rate bureau violations by rejecting the relevant tariffs.

classifications used by approximately 3000 motor carriers.² Petitioner National Classification Committee (NCC), an autonomous standing committee of the NMFTA consisting of 100 carriers, is the agency through which the participating motor carriers collectively establish their freight classifications. Pet. 4; Pet. App. 9a. In May 1981, the NMFTA filed an amended agreement intended to comply with the requirements set forth in the MCA and the Commission's interpretive ruling (see pages 2-3, *supra*). Although the NMFTA currently functions in accordance with that agreement, it has not yet been approved by the Commission.³

This case involves a challenge by shippers to the NMFTA's reclassification of "fried bacon or pork rinds and skins," which resulted in higher freight rates for the commodity. The shippers alleged that the procedures used by petitioners violated the provisions of the MCA designed to open the ratemaking process and prevent excessive involvement by bureau employees. Full-time rate bureau employees (the National Classification Board or NCB) initiated the proposal in question, recommended that it be docketed, conducted the only hearing on the proposal and recommended its approval. The carriers whose rates were affected by the proposal never met to discuss it. The staff's docketing and approval recommendation were ratified through mail

²Classifications are groupings of commodities of equivalent transportation characteristics, incorporated into so-called "class rate" tariffs published by regional rate bureaus and individual carriers. Thus, while NMFTA does not itself publish actual freight rates, its classification decisions often effectively do set such rates. See Pet. App. 9a n.5; *National Classification Committee v. United States*, No. 83-1474 (D.C. Cir. Oct. 26, 1984), slip op. 3, 4.

³Over 40 motor carrier rate bureaus filed new or amended rate bureau agreements with the Commission following enactment of the MCA. The ICC has provisionally approved several of these agreements, but has not yet acted on the NMFTA's.

balloting by the 25 carriers on the National Classification Review Committee, a subcommittee of the NCC. The proposal was formally docketed in the name of the NCC itself rather than a particular carrier or shipper. When shippers subsequently invoked their statutory right to know the identity of the "proponent" of the new classification (49 U.S.C. 10706(b)(3)(B)(v)), they were told that it was the NCC. Pet. App. 10a-12a.

Acting on the shippers' protest, the Commission's Suspension Board suspended the proposed classification change and instituted an investigation pursuant to 49 U.S.C. 10708 (Pet. App. 8a). Following an adjudicatory proceeding including the submission of evidence, the entire Commission concluded that petitioners' procedures violated the provisions requiring specific carrier responsibility for tariff proposals set forth in Section 10706(b)(3)(B)(iv) and (v) and the ICC's 1980 interpretive ruling because those procedures afforded the rate bureau employees an impermissible degree of influence and encouraged a passive or "rubber stamp" role for the carriers (Pet. App. 12a-19a). The Commission recognized that the challenged procedures may comply with the NMFTA's unapproved agreement, but reasoned that, in accordance with Section 14(e) of the MCA (see page 3, *supra*), "[u]ntil the Commission completes its review of the NCC agreement, NCC must comply with the applicable law and regulations in order for its actions to receive [the Commission's] approval" (Pet. App. 15a).

The Commission determined that petitioners' procedures were unlawful in the following respects: the proposed reclassification was initiated by the NCB rather than a carrier or shipper (Pet. App. 13a); the proposal was docketed in the name of the NCC rather than an identifiable carrier (*id.* at 13a-14a); rate bureau employees held the only hearing on the proposal and recommended its adoption (*id.* at 15a-17a); and it was approved by a mail vote of the carrier

subcommittee (*id.* at 17a-18a). The Commission found nothing to indicate that the carriers comprising the NCC had exercised any independent judgment on the proposal and “every reason to conclude that the organization is allowing its employees to wield essentially unfettered discretion” in violation of the MCA and its implementing regulations (Pet. App. 16a).

In light of these violations, the Commission ordered on July 20, 1983 that the proposed reclassification, which went into effect on June 11, 1983 (Pet. App. 7a n.1), be cancelled, *i.e.*, prospectively invalidated (*id.* at 19a). On the other hand, the Commission avoided the extreme step of voiding the tariff *ab initio* and creating a basis for carrier overcharge liability for past shipments based on the full difference between the rejected rate and the last one lawfully in effect. See *ICC v. ATA, Inc.*, slip op. 3-4, 5-6. On a petition for review, the court of appeals summarily affirmed, “generally for the reasons stated” by the Commission (Pet. App. 1a-2a).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners’ claim that review is necessary to provide “legal certitude” is wholly insubstantial; the Commission’s decision, affirmed by the court of appeals, clearly specifies what procedures petitioners must follow in order to comply with the law. Review by this Court is unwarranted.

1. Petitioners argue (Pet. 9-12) that the Commission’s interpretation of the requirements of Section 10706(b)(3)(B)(iv) and (v) is erroneous. On the contrary, the challenged administrative interpretation of the statute plainly is within the power of the ICC and is consistent with the congressional intent behind the MCA. Just last Term, the Court upheld the Commission’s exercise of its discretionary authority under the Act, recognizing the ICC’s “key

role in holding carriers to the [MCA] § 14 guidelines” (*ICC v. ATA, Inc.*, slip op. 16). The agency action upheld in *ATA* — the implication of a potent remedy not expressly provided for in the statute — was significantly more far reaching than the Commission’s interpretation of the express statutory requirements relating to the extent of rate bureau employee involvement in collective tariff-setting activities. This is just the sort of administrative interpretation entitled to substantial deference by the courts. See, *e.g.*, *Schweiker v. Hogan*, 457 U.S. 569, 588 (1982).

Petitioners focus on two of the four findings of the Commission with respect to the lawfulness of their procedures.⁴ They contend first that the Commission erred in holding that the employees comprising the NCB should not have made a recommendation to the carriers with respect to the reclassification proposal. In support, they cite (Pet. 10) legislative history noting the value of employee recommendations. But the guiding congressional policy behind the relevant portions of the MCA was to limit the involvement of rate bureaus in favor of more direct carrier determination of tariffs. See page 2, *supra*. The reference relied on by petitioners, then, indicates only that employee recommendations may be appropriate in many instances, not that all such recommendations are *per se* legal. The Commission’s decision is completely consistent with congressional intent. The Commission did not forbid all employee recommendations, but rather determined that the evidence in this particular case showed that the “recommendation” was in reality

⁴Petitioners apparently do not challenge the ICC’s determination that the procedures followed here were unlawful because employees held the only hearing on the proposed reclassification and it was approved by mail vote without discussion by the carriers (see page 5, *supra*). Accordingly, even if they were correct with respect to the two findings that they do challenge, the Commission’s order cancelling the tariff would still be proper.

an integral part of a procedure that vested effective control of the ratemaking process in rate bureau employees (see Pet. App. 15a-16a).⁵ This factual finding does not warrant review by this Court.

Petitioners also contend that the Commission erred in interpreting Section 10706(b)(3)(B)(v) to prohibit docketing classification proposals in the name of the NCC. This Section requires rate bureaus to divulge, on request, the name of the proponent of a rate and the vote cast by any member carrier. It is not enough, as petitioners argue, that only the votes be made known. Such a reading would render meaningless the separate statutory requirement that the proponent of a rate be identified. It would also undermine Congress's purpose to approximate marketplace restraints on carriers engaged in collective ratemaking, for it would diffuse responsibility for action adverse to shippers among all concurring carriers. See Pet. App. 13a-14a. Indeed, because carriers may vote on classification proposals relating to commodities that they do not carry, a commodity could be reclassified without any identifiable participation by the actual carriers of the commodity. See 49 U.S.C. 10706(b)(3)(B)(ii); *Motor Carrier Rate Bureaus*, *supra*, 364 I.C.C. at 496-497. The aggregate adverse impact of petitioners' procedural device is apparent from the evidence showing that NCC docketed 144 proposals in its own name and only 20 in the names of individual carriers (Pet. App. 13a n.11). As the Commission noted (*ibid.*), "[t]his suggests that NCC is capable of concealing the identity of a carrier proponent in contravention of the statutory mandate to disclose the identity of proponents." To carry out that

⁵"It is undisputed that NCC's approval of the pork skins proposal was based on a recommendation by NCB. There is nothing to indicate that [the carriers] exercised any independent judgment on the proposal. Thus, there is every reason to conclude that the organization is allowing its employees to wield essentially unfettered discretion." Pet. App. 16a.

mandate, the ICC reasonably interpreted the statute to forbid docketing in the name of the carrier committee as a whole.⁶

2. Petitioners argue (Pet. 12-14) that their actions should be inviolable because they complied with the rate bureau agreement and that to hold otherwise would place them on the horns of a dilemma, where they would face liability whether or not they complied with that agreement.⁷ Petitioners ignore the central fact that their agreement has never been approved by the Commission (see page 4, *supra*). Had it been, the Commission could not find unlawful under Section 10706(b) tariffs formulated in compliance with that agreement.⁸ But it is clear under Section 14(e) of the MCA

⁶Petitioners base their argument on the fact that Congress did not in the MCA undertake to eliminate rate bureaus, specifying that carriers may adopt "procedures for joint consideration, initiation or establishment of [rates and classifications]" (49 U.S.C. 10706(b)(2)). This provision does not limit Section 10706(b)(3)(B)(v) by legalizing committee docketing of proposals as a device to prevent discovery of their true proponents. Joint initiation of rates and classifications is different from docketing, which involves a request that carriers consider initiating a new rate or classification. It is the latter function that is relevant here, and Congress clearly intended that it be carried out by identifiable carriers (see page 2, *supra*). Moreover, the Commission's reading of the statute, even if not compelled by its language, is surely within its interpretive discretion (see pages 6-7, *supra*), especially where, as here, Congress expected that the new statute would "result in a significant change in the way motor carriers price their services" (House Report 28). See generally *American Trucking Ass'ns, Inc. v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967) (the ICC "is neither required nor supposed to regulate the present and future within the inflexible limits of yesterday").

⁷This argument was not raised before the Commission and therefore should not be considered by the Court. See, e.g., *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519, 553-554 (1978); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). It is, in any event, meritless.

⁸The Commission could, however, reopen the approval proceeding to reconsider whether the agreement complied with the Act. See *ICC v. ATA*, slip op. 4-5 & n.3.

that a rate bureau's immunity pending approval of a new agreement depends not just on submission to the ICC of the agreement, but on compliance with the statute and the Commission's regulations (see Pet. App. 10a, 15a; page 3, *supra*).⁹ Aspects of the agreement here violate both the statute and the Commission's 1980 interpretive ruling in *Motor Carrier Rate Bureaus, supra*, as petitioners recognized or should have recognized when they submitted their agreement in 1981. The governing statutory and regulatory provisions plainly prevail over those contained in an unapproved agreement. There is neither authority nor reason for granting petitioners immunity in these circumstances simply because the Commission has not yet concluded its complete review of all of the procedures contained in the agreement. The way out of petitioners' self-imposed "dilemma" is simply to amend their agreement to conform to the requirements specified by Congress and the Commission.

⁹See also 49 U.S.C. 10706(b)(2) (antitrust immunity is available "[i]f the Commission approves the agreement"); House Report 28, 30 (rate bureaus may continue to function only "subject to the provisions of this section" and agreements shall receive ICC approval "only if each of the [restrictions in the Act] are met").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1985